Aston Villa Sdn Bhd v Infra Segi Sdn Bhd and another case

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24C-174–10 OF 2017 AND WA-24C-190–10 OF 2017
LEE SWEE SENG J
19 APRIL 2018

Building and Construction Law — Construction contracts — Adjudication — Claimant sought to enforce adjudication decision — Respondent applied to set aside decision — Whether there was breach of natural justice when adjudicator failed to consider defence raised for first time in adjudication response — Whether there was breach of natural justice when adjudicator failed to consider respondent's cross-claim for damages for loss of reputation — Construction Industry Payment and Adjudication Act 2012

Infra Segi Sdn Bhd ('Infra Segi') as the claimant served a payment claim to Aston Villa Sdn Bhd ('Aston Villa') as the respondent in an adjudication between the parties. Aston Villa then filed an application in Originating Summons No WA-24C-174–10 of 2017 ('the setting aside application) to set aside the adjudication decision given by an adjudicator. Infra Segi also filed an application in Originating Summons No WA-24C-190–10 of 2017 ('the enforcement application') to enforce the adjudication decision against Aston Villa. The respondent appointed the claimant as the contractor for a project called 'Construction and Completion of 3 Blocks Office (Soho) (1080 Units) on Lot 1810 (Lot Baru 51628 & 51629), Jalan Kelang Lama, Kuala Lumpur' for a contract sum of RM277,694,462 ('the contract'). The final contract sum was RM239,956,746.12 based on the final statement of accounts which the respondent refused to sign without stating which parts of final account they disagreed. The claimant had completed the contract but the respondent did not pay the balance contract sum of RM10,223,318.96 to the claimant. The respondent's architect had issued the certificate of practical completion ('CPC') for the project on 29 March 2013 and the defect liability period expired on 28 March 2014 which was 12 months from the date of the issuance of the CPC. The architect was reluctant to issue the certificate of making good defects ('CMGD') because of the complaint of the respondent with respect to some defects that arose after the defect liability period was over. The claimant had offered to rectify these defects on a goodwill basis but was denied permission to enter the premises to effect the rectification works. Having reached a stalemate, the claimant availed itself of the facilities of statutory adjudication under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). The claimant duly served its adjudication claim on 4 July 2017 and the respondent served its adjudication response dated 19 July 2017. In the adjudication response, the respondent raised defences for the first time

and a cross claim against the claimant for the sum to be determined by the adjudicator being the general damages for the loss of reputation and image. On 20 September 2017, the adjudicator granted the claimant the declaration prayed for subject to the adjustment of the final contract sum by deducting therefrom the sum of RM109,950 which was made up of the sum of RM8,750 being the rectification cost of the swimming pool and the sum of RM101,200 being the rectification cost for the expansion joint and also granted remedies. Hence, the respondent had prayed for the adjudication decision to be set aside on ground of a breach of natural justice. The issues for consideration were: (a) whether there was a failure to consider the defence raised for the first time in the adjudication response and hence a breach of natural justice; and (b) whether the adjudicator had failed to consider the respondent's cross-claim for damages for loss of reputation and thus in breach of natural justice.

Held, dismissing the setting aside application and granting the enforcement application with costs of RM10,000 and RM5,000 respectively to be paid to the claimant:

(1) The adjudicator appeared to have used the language of the cases before the *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 ('*View Esteem* FC case') and had stated that he was guided by the principles set out in *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd* [2015] MLJU 695 ('*View Esteem* HC case'). The adjudicator might have erroneously preceded on the wrong principle and paradigm, against the backdrop of the *View Esteem* HC case. However, the court was very convinced and convicted that the adjudicator in considering whether the claimant had proved its payment claim had nevertheless carefully considered the defences raised with respect to the defects in the de-bonding of the swimming pool and the defects in the expansion joint (see paras 30, 33 & 35).

(2) The adjudicator tackled head on the issue or defence of the defects in the de-bonding of the tiles in the swimming pool when he set out his reasons in his decision. This clearly showed that the adjudicator did carefully consider and analyse the evidence before him. The adjudicator had considered the defence of defects not rectified with respect to the de-bonding of the tiles in the swimming pool and the willingness of the claimant to rectify it on a goodwill basis that he had allowed a sum of RM8,750 (see paras 41–43).

(3) The court was sure and satisfied that the adjudicator had considered the defence of defects in the expansion joint and indeed did allow the sum of RM101,200 to be deducted from the claimant's claim being the costs to rectify this defect from the evidence adduced (see para 44).

(4) The respondent could not stubbornly refuse the CMGD to be issued by the architect on account of these two defects that the respondent had

identified and at the same time, putting obstacle in the path of the claimant to make these repairs. The respondent could not in its defence said that they had not consented to the statement of final account without descending to the details of which items in the statement they had not agreed and what was the alternative sum that the respondent was asserting and why. Such a dispute on the statement without stating the reason therefore smacks of a lack of bona fide (see paras 46 & 50).

(5) Thus there was no breach of natural justice that had been made out and correspondingly the adjudicator had decided the issues submitted for him to decide even though the defences of the respondent were raised for the first time in the adjudication response and he had certainly kept to the jurisdiction conferred on him by the parties (see para 53).

(6) The adjudicator did not come to that conclusion by a mere dismissing of the cross-claim on the pure ground of a lack of jurisdiction. The adjudicator had given his additional reason for dismissing the respondent's claim for loss of reputation in that such a claim was unsustainable in an action founded on breach of contract. Besides, this was not a claim for defamation. At any rate, there was no evidence before the adjudicator with respect to any loss of reputation. If at all, whatever reputation that the respondent was zealous of guarding had been seriously dented by its own conduct in withholding the payment for the balance of the contract sum considering that the CPC has been issued and the defect liability period had expired (see paras 61 & 63).

[Bahasa Malaysia summary

Infra Segi Sdn Bhd ('Infra Segi') sebagai pihak yang menuntut menyampaikan tuntutan bayaran kepada Aston Villa Sdn Bhd ('Aston Villa') sebagai responden dalam penghukuman antara pihak-pihak. Aston Villa kemudian memfailkan permohonan Saman Pemula No WA-24C-174–10 Tahun 2017 ('permohonan mengetepikan') untuk mengetepikan keputusan penghukuman yang dibenarkan oleh seorang adjudikator. Infra Segi juga memfailkan satu permohonan Saman Pemula No WA-24C-190–10 Tahun 2017 ('permohonan penguatkuasaan') untuk menguatkuasa keputusan penghukuman terhadap Aston Villa. Responden melantik pihak yang menuntut sebagai kontraktor bagi satu projek yang dipanggil 'Construction and Completion of 3 Blocks Office (Soho) (1080 Units) on Lot 1810 (Lot Baru 51628 & 51629), Jalan Kelang Lama, Kuala Lumpur' untuk kontrak berjumlah RM277,694,462 ('kontrak'). Jumlah akhir kontrak adalah RM239,956,746.12 berdasarkan penyata akhir akaun yang responden enggan tandatangani tanpa menyatakan bahagian mana akaun akhir yang mereka tidak persetujui. Pihak yang menuntut telah menyempurnakan kontrak tetapi responden tidak membayar baki jumlah kontrak sebanyak RM10,223,318.96 kepada pihak yang menuntut. Arkitek responden telah mengeluarkan *certificate of practical completion* ('CPC') untuk projek tersebut pasa 29 Mac 2013 dan tempoh

liabiliti kecacatan tamat pada 28 Mac 2014 iaitu 12 bulan dari tarikh pengeluaran CPC. Arkitek tersebut enggan mengeluarkan *certificate of making good defects* ('CMGD') kerana aduan responden berkenaan dengan beberapa kecacatan yang timbul selepas tempoh liabiliti kecacatan tamat. Pihak yang menuntut telah menawarkan untuk membetulkan kecacatan tersebut atas dasar muhibah tetapi dinafikan keizinan untuk memasuki premis untuk melaksanakan kerja pembaikian. Setelah mencapai kebuntuan, pihak yang menuntut memanfaatkan kemudahan penghukuman statutori di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta'). Pihak yang menuntut telah menyampaikan tuntutan penghukuman pada 4 Julai 2017 dan responden menyampaikan jawapan penghukuman pada 19 Julai 2017. Didalam jawapan penghukuman, responden membangkitkan pembelaan untuk kali pertama dan tuntutan balas terhadap pihak yang menuntut untuk jumlah yang akan ditentukan oleh adjudikator sebagai ganti rugi am untuk kehilangan reputasi dan imej. Pada 20 September 2017, pengadil membenarkan pihak yang menuntut pengisytiharan yang dipohon tertakluk kepada pelarasan jumlah akhir kontrak dengan menolak jumlah sebanyak RM109,950 yang terdiri daripada jumlah RM8,750 sebagai kos pembaikian kolam renang dan jumlah RM101,200 sebagai kos pembaikian sendi pengembangan dan juga dibenarkan remedi. Oleh itu, responden telah memohon keputusan penghukuman diketepikan atas dasar pelanggaran keadilan semula jadi. Isu-isu pertimbangan adalah: (a) sama ada terdapat kegagalan untuk mempertimbangkan pembelaan yang dibangkitkan kali pertama dalam jawapan penghukuman dan oleh itu pelanggaran keadilan semula jadi; dan (b) sama ada adjudikator gagal untuk mempertimbangkan tuntutan balas responden untuk kehilangan reputasi dan dengan itu pelanggaran keadilan semula jadi.

Diputuskan, menolak permohonan mengetepikan dan membenarkan permohonan penguatkuasaan dengan kos RM10,000 dan RM5,000 masing-masing untuk dibayar kepada pihak yang menuntut:

(1) Adjudikator didapati telah menggunakan bahasa kes-kes sebelum *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 ('kes *View Esteem* MP') dan telah menyatakan bahawa beliau berpandukan prinsip-prinsip yang dinyatakan dalam *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd* [2015] MLJU 695 ('kes *View Esteem* MT'). Adjudikator mungkin telah tekhilaf mendahului prinsip dan paradigma yang salah, dengan berdasarkan kes *View Esteem* MT. Walau bagaimanapun, mahkamah yakin dan percaya bahawa adjudikator dalam mempertimbangkan sama ada pihak yang menuntut telah membuktikan tuntutan bayaran telah mempertimbangkan dengan sebaik mungkin pembelaan yang dibangkitkan berkenaan kecacatan dalam ikatan semula kolam renang dan kecacatan pada sendi pengembangan (lihat perenggan 30, 33 & 35).

(2) Adjudikator menangani isu atau pembelaan kecacatan dalam ikatan semula jubin dalam kolam renang ketika beliau menyatakan alasannya dalam keputusannya. Ini jelas menunjukkan bahawa adjudikator telah mempertimbangkan dengan teliti dan menganalisis bukti dihadapannya. Adjudikator telah mempertimbangkan pembelaan kecacatan yang tidak dibaiki berkenaan dengan ikatan semula jubin dalam kolam renang dan kesanggupan pihak yang menuntut untuk membaikinya atas dasar muhibah yang mana beliau membenarkan jumlah sebanyak RM8,750 (lihat perenggan 41–43).

(3) Mahkamah yakin dan berpuas hati bahawa adjudikator telah mempertimbangkan pembelaan kecacatan dalam sendi pengembangan dan sememangnya telah membenarkan jumlah sebanyak RM101,200 untuk ditolak daripada tuntutan pihak yang menuntut sebagai kos untuk membaiki kecacatan ini daripada bukti yang dikemukakan (lihat perenggan 44).

(4) Responden tidak boleh berdegil enggan untuk CMGD dikeluarkan oleh arkitek atas sebab kedua-dua kecacatan tersebut yang dikenalpasti oleh responden dan pada masa yang sama, meletakkan halangan dalam laluan pihak yang menuntut untuk membuat pembaikian. Responden tidak boleh dalam pembelaannya menyatakan bahawa mereka tidak bersetuju dengan penyata akhir akaun tanpa menurunkan butiran item mana dalam penyata yang mereka tidak persetujui dan apakah jumlah alternatif yang dituntut responden dan mengapa. Pertikaian seperti itu pada kenyataannya tanpa menyatakan alasan oleh itu menimbulkan kekurangan bona fide (lihat perenggan 46 & 50).

(5) Oleh itu tiada pelanggaran keadilan semula jadi yang telah dibuat dan adjudikator telah memutuskan isu-isu yang dikemukakan untuk beliau putuskan walaupun pembelaan responden dibangkitkan untuk pertama kali dalam jawapan penghukuman dan beliau pastinya terus dalam bidang kuasa yang diberikan kepadanya oleh pihak-pihak (lihat perenggan 53).

(6) Adjudikator tidak sampai pada kesimpulan itu dengan hanya menafikan tuntutan balas atas alasan kekurangan bidang kuasa. Adjudikator telah memberikan alasan tambahan untuk menolak tuntutan responden untuk kehilangan reputasi kerana tuntutan tersebut tidak diterima dalam tindakan berasaskan pelanggaran kontrak. Selain itu, ini adalah bukan tuntutan untuk fitnah. Walau apa pun, tiada bukti kepada adjudikator berkenaan dengan kehilangan reputasi. Jika benar, apa-apa reputasi yang responden bersungguh-sungguh menjaga telah rosak dengan kelakuannya sendiri dengan menahan pembayaran bagi baki jumlah kontrak memandangkan CPC telah dikeluarkan dan tempoh liabiliti kecacatan telah tamat (lihat perenggan 61 & 63).]

Notes

For cases on construction contracts, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4227–4232

Cases referred to

Addis v Gramophone Co Ltd [1909] AC 488, HL (refd)
Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358, CA (refd)
Kapt (B) Haji Mohamad bin Ismail v Perwira Affin Bank Bhd [2001] 5 MLJ 101; [2001] 5 CLJ 184, HC (refd)
Milicent Rosalind Danker & Percetion Management International Limited v Malaysia-Europe Forum Berhad, Natasha Zulkifli & Anor [2011] MLJU 452; [2012] 2 CLJ 1076, HC (refd)
Pilon Ltd v Breyer Group plc [2010] EWHC 837 (TCC), QBD (folld)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22, FC (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd [2015] MLJU 695, HC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 5, 6(4), 8, 10, 11, 15(b), (d), 25(a), (f), (j), (m), (n), 27(1)
Rules of Court 2012 O 92 r 1(a)

Mokhzani Harris Yusof (Edlin Ghazaly & Assoc) in Originating Summons No WA-24C-174–10 of 2017 for the plaintiff.
Harmeet Singh (Chan Mun Fei with him) (Raja Eleena Siew Ang & Assoc) in Originating Summons No WA-24C-190–10 of 2017 for the plaintiff.
Mokhzani Harris Yusof (Edlin Ghazaly & Assoc) in Originating Summons No WA-24C-190–10 of 2017 for the defendant.
Harmeet Singh (Chan Mun Fei with him) (Raja Eleena Siew Ang & Assoc) in Originating Summons No WA-24C-174–10 of 2017 for the defendant.

Lee Swee Seng J:

[1] Aston Villa Sdn Bhd ('Aston Villa'), as the plaintiff, filed an application in Originating Summons No WA-24C-174–10 of 2017 ('the setting aside application') to set aside an adjudication decision given on 20 September 2017 by an adjudicator with respect to a payment claim served by the claimant Infra Segi Sdn Bhd ('Infra Segi') on Aston Villa as the respondent in the adjudication between the parties. Infra Segi was thus the defendant in that application.

[2] Infra Segi, on the other hand, as the plaintiff, also filed an application in Originating Summons No WA-24C-190–10 of 2017 ('the enforcement

application') to enforce the adjudication decision against Aston Villa as the defendant.

[3] Needless to say the adjudication was a statutory adjudication under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA').

[4] For consistency of reference and to avoid confusion in identities, the parties shall be referred to as the claimant and respondent, as they were in the adjudication, or sometimes as Infra Segi and Aston Villa respectively.

PROJECT

[5] By a letter of acceptance dated 23 December 2010, the respondent appointed the claimant as the contractor for a project called 'Construction And Completion of 3 Blocks Office (Soho) (1080 Units) On Lot 1810 (Lot Baru 51628 & 51629), Jalan Kelang Lama, Kuala Lumpur' for a contract sum of RM277,694,462 ('the contract').

[6] The final contract sum was RM239,956,746.12 based on the final statement of accounts which the respondent refused to sign without stating which parts of final account they disagreed.

PROBLEM

[7] For all intents and purposes the claimant had completed the contract but the respondent was not paying the balance contract sum of RM10,223,318.96 to the claimant. The respondent's architect had issued the certificate of practical completion ('CPC') for the project on 29 March 2013. The defect liability period expired on 28 March 2014 which is 12 months from the date of the issuance of the CPC.

[8] There was however a reluctance on the part of the architect to issue the certificate of making good defects ('CMGD'). That was because of the complaint of the respondent with respect to some defects that arose after the defect liability period was over.

[9] The claimant had offered to rectify these defects on a goodwill basis but was denied permission to enter the premises to effect the rectification works. Having reached a stalemate the claimant availed itself of the facilities of statutory adjudication under the CIPAA.

PROCEEDINGS IN ADJUDICATION

[10] The claimant, as the unpaid party, served a payment claim on the respondent pursuant to s 5 of the CIPAA and claimed for an outstanding sum of RM10,223,318.96 being the balance contract sum. The claimant also had claimed that the CMGD, the penultimate certificate of payment (pursuant to cl 30.6) and the final certificate (pursuant to cl 30.7) ought to be and/or ought to have been issued by the architect.

[11] The respondent as the non-paying party did not serve a payment response. According to s 6(4) of the CIPAA the respondent was deemed to have disputed the entire of the payment claim.

[12] On 12 May 2017 the claimant initiated the adjudication proceedings by serving a written notice of adjudication under s 8 of the CIPAA. The said notice contained the nature and description of the dispute and the remedy sought together with the supporting documents.

[13] The claimant duly served its adjudication claim on 4 July 2017 and the respondent served its adjudication response dated 19 July 2017 pursuant to s 10 of the CIPAA.

[14] In the adjudication response, the respondent, for the first time, raised the following defences and cross claim and summarised as follows by the adjudicator at para 6.3 of the adjudication decision:

(a) the respondent disputes that the claimant has made good all defects, shrinkages and/or faults as claimed;

(b) the respondent never agreed and/or consented to the amount of money to be paid to the claimant as stated in the statement of final account;

(c) the respondent, architect and quantity surveyor have never signed the said statement of final account; and

(d) the respondent has a cross claim against the claimant for the sum to be determined by the adjudicator being the general damages for the loss of reputation and image.

[15] The claimant served its adjudication reply under s 11 of the CIPAA reiterating that they were not obliged to rectify the alleged defects, notice of which was given long after the expiry of the defect liability period.

[16] Specifically the claimant stated in its adjudication reply that with respect to the de-bonding of tile in the swimming pool, which was one of the complaints of the respondent, the claimant on a goodwill basis was prepared

A and willing to effect the rectification as long as access to the swimming pool was allowed by the Scott Garden SOHO Management Sdn Bhd ('Scott Garden') and the pool is de-watered.

B **[17]** The claimant stated, rather exasperatedly, that it had purchased the tiles and delivered the same to Scott Garden but had not been able to carry out the rectification due to the respondent's own action and omission.

C **[18]** There was also the other complaint of the respondent with respect to crack in an expansion joint. The claimant asserted that the defects had arisen from the inadequacy of the design and/or specifications and was not attributable to the claimant's materials or workmanship. The claimant further highlighted the fact that the defects were raised long after the defect liability period and that the respondent did not revert to the claimant's proposed D rectification and hence the rectification could not be carried out.

[19] This would be an opportune time to set out the two clauses in the contract which would provide the backdrop for the claimant's assertion that legally they were no longer obliged to attend to the defects after the defect E liability period had expired:

(a) *cl 15.3*:

> Notwithstanding Clause 15.2 the architect may whenever he considers it necessary issues instructions requiring any defect, shrinkage, or other faults F which appear within the Defects Liability Period and which are due to materials or workmanship not in accordance with this Contract to be made good. The contractor shall within a reasonable time after receipt such instructions comply with the same entirely at his own cost, unless otherwise instructed by the architect, in which case the contract Sum shall be adjusted G accordingly. *No such instruction shall be issued after delivery of a Schedule of Defects or after fourteen (14) days from the expiration of the Defects Liability Period*.

(b) *cl 15.4*:

H > When in the opinion of the architect any defects, shrinkages or other faults which he may have required to be made good under Clause 15.2 and 15.3 have been made good he shall issue a Certificate of Making Good Defects and completion of making good defects shall be deemed to have taken place on the day named in the Certificate. (Emphasis added.)

I **[20]** The adjudicator directed for a meeting with the parties for directions to be given and for further facts to be ascertained in the exercise of his powers under s 25(a), (f) and (j) of the CIPAA and in particular the following:

(a) what would be the reasonable cost for the de-bond swimming pool tiles issues; and

(b) what would be the reasonable cost of the expansion joint issue.

[21] At the meeting on 10 August 2017 the adjudicator also issued directions that the claimant do furnish by way of an affidavit the following documents:

(a) quotation for the cost for the de-bond swimming pool tiles issue;

(b) quotation for the cost for the expansion joint issue; and

(c) list of architect's schedule of defects.

[22] The claimant complied with the adjudicator's directions and submitted an affidavit affirmed on 17 August 2017 enclosing the following:

(a) a quotation by Ju Wah Renovation for Rectification of Swimming Pool Tiles amounting to RM8,750;

(b) a quotation by Matlamat Anggun Sdn Bhd for the 'Expansion Joint Polycelly Poly-PU-VS' amounting to RM101,200; and

(c) the final schedule of defects dated 25 March 2014.

[23] The respondent, however, failed to comply with the adjudicator's directions to furnish the quotations requested for.

[24] The adjudicator noted that there is no dispute as to the reasonableness of the quotations furnished by the claimant.

[25] The adjudicator delivered his decision and granted the claimant the declaration prayed for subject to the adjustment of the final contract sum by deducting therefrom the sum of RM109,950. The said sum of RM109,950 was made up of the sum of RM8,750 being the rectification cost of the swimming pool and the sum of RM101,200 being the rectification cost for the expansion joint. The adjudicator granted the following remedies in his adjudication decision as follows:

(a) a declaration that the certificate of making good defects, the penultimate certificate of payment pursuant to cl 30.6 and the final certificate pursuant to cl 30.7 of the 'Agreement And Conditions of Building Contract (Private Edition with Quantities) (PAM)' for the ('the project') be deemed issued by the architect subject to the variation to the final contract sum by deducting the sum of RM109,950;

(b) the defendant shall pay to the plaintiff immediately:

(i) RM10,113,368.96;

(ii) interest of 5%pa on the sum of RM10,113,368.96 from 10 March 2017 until the date of full payment;

(c) the defendant shall pay cost of RM101,289 to the plaintiff; and

(d) the aforesaid sums shall be paid by the defendant to the plaintiff via a banker's cheque within seven days from the date of the decision dated 20 September 2017.

PRAYERS

[26] The respondent had prayed for the adjudication decision to be set aside on ground of a breach of natural justice under s 15(b) of the CIPAA in failing to consider the defences raised in the adjudication response served. The respondent also alleged that the adjudicator had exceeded his jurisdiction in the decision delivered, a ground for setting aside under s 15(d) of the CIPAA.

PRINCIPLES

Whether there was a failure to consider the defence raised for the first time in the adjudication response and hence a breach of natural justice

[27] The adjudication decision was delivered on 20 September 2017 before the watershed Federal Court case of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 ('*View Esteem* FC case'). The jurisprudence before the *View Esteem* FC case was that the adjudicator's jurisdiction as provided for in s 27(1) of the CIPAA is confined to the matters raised in the payment claim and the payment response and that if there is no defence raised in the payment response as in no payment response was served, then the respondent is deemed to have disputed the whole of the payment claim but that the respondent cannot raise for the first time defences in its adjudication response defences not raised in its payment response or that there was no payment response served.

[28] That approach and understanding has been modified by the Federal Court in *View Esteem* FC case as follows:

> [65] We are of the view that *an adjudicator who wrongly rules out considering a defence presented to him would be in breach of natural justice*. This point arose in *Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC) which like in our present case was concerned with progress claims that were cumulative in nature. The decision by Justice Coulson bears close reading. At paras 24–28 the learned judge observed:
>
> > 24. It seems to me clear beyond doubt that the adjudicator erred in failing to take into account Breyer's defence by reference to the overpayment on batches 1–25. Whilst he was quite correct to regard the notice of adjudication as setting out the boundaries of his jurisdiction, he failed to appreciate that what Pilon were seeking by that notice was not only an interim valuation of batches 26–62, but

also an interim payment of any sum considered owing to them. Whilst the valuation required him to have regard to batches 26–62 only, the concomitant claim for payment meant that the adjudicator was obliged to consider whether Breyer were right to say that a much smaller net payment was due than that contended for by Pilon, because Pilon had already been overpaid on batches 1–25. In other words, the notice of adjudication gave the adjudicator the jurisdiction to consider what, if any, further sum should be paid by way of interim payment from Breyer to Pilon and that issue, of necessity, involved a consideration of Breyer's defence based on the alleged overpayment on batches 1–25.

25. It is not uncommon for adjudicators to decide the scope of their jurisdiction solely by reference to the words used in the notice of adjudication, without having regard to the necessary implications of the words: that was, for example, what went wrong in *Broardwell*. Adjudicators should be aware that the notice of adjudication will ordinarily be confined to the claim being advanced; it will rarely refer to the points that might be raised by way of a defence to that claim. But, subject to questions of withholding notices and the like, a responding party is entitled to defend himself against a claim for money due by reference to any legitimate available defence (including set-off), and thus such defences will ordinarily be encompassed within the notice of adjudication.

26. As a result, an adjudicator should think very carefully before ruling out a defence merely because there was no mention of it in the claiming party's notice of adjudication. That is only common sense: it would be absurd if the claiming party could, through some devious bit of drafting, put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim.

27. I understand that it may be tempting for a claiming party in an adjudication to seek to limit the adjudicator's jurisdiction in a way in which that party believes to be to its advantage. I am in no doubt that is what happened here: *Pilon* did not wish the adjudicator to have any regard to batches 1–25, and therefore deliberately limited the scope of the adjudication notice to batches 26–62. It was their case that the overpayment claim was outside the adjudicator's jurisdiction, and that is what they (successfully) urged on the adjudicator. Thus, this is a case where *Pilon* sought a tactical advantage by putting forward an erroneous statement of the adjudicator's jurisdiction and, as the decision in *Quartzelec* shows that can be a dangerous tactic to adopt.

28. In the result therefore, I consider that *the adjudicator deliberately placed an erroneous restriction on his own jurisdiction, which amounted to a breach of natural justice* ... (Emphasis added.)

[29] The Federal Court further held:

[74] For the reasons above stated it is our considered view that *an adjudicator is not excluded from considering all the defences raised by a respondent in the adjudication response* whether found in the first response under s 6 of the CIPAA or not. In the circumstances of this case, *the adjudicator had acted in breach of natural justice in excluding and refusing to consider certain de fences raised by the appellant, and his*

decision cannot stand for that reason. (Emphasis added.)

[30] The fear and foreboding of the respondent that the adjudicator might have fallen into the error that had characterised the position of the law pre-*View Esteem* FC case adjudication decisions is understandable and more so when the adjudicator appeared, in p 17 of his adjudication decision, to have used the language of the cases pre-*View Esteem* FC case and had stated that he was guided by the principles set out in *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd* [2015] MLJU 695 ('*View Esteem* HC case') as follows:

> [67] The failure to file a payment response will only afford the non-responding party some security or comfort of not having had a default judgment of sorts entered against them because sub-s 6(4) deems the payment claim to be disputed.
>
> [68] For the unpaid party, the absence of a payment response means that the unpaid party as a claimant in the adjudication proceedings will only be required to prove the matters raised in the payment claim without having to meet any onus of proof which may, in a defended payment disputed through the payment response, shift back to the unpaid party or claimant.

[31] The fear was further heightened with the quotation of the adjudicator at p 18 of his decision from the passage in the book by Chow Kok Fong, Lim Chong Fong and Oon Chee Kheng entitled *Adjudication of Construction Payment Disputes in Malaysia* (Lexis Nexis 2014) at p 65 as follows:

> ... It follows that in the absence of the payment response, the scope of the adjudication proceedings falls to be defined only by the payment claim. Thus if the non-paying party did not issue a payment response to assert its entitlement to set-off the amount claimed for defects or if he issues a payment response but the payment response fails to raise this defence, this would effectively preclude the adjudicator from considering this defence in the subsequent proceedings.

[32] The adjudicator continued immediately after the above quotation as follows:

> Based on the principles of the above authorities, in the instant case, I shall consider whether the claimant as the unpaid party has proved the matters raised in the payment claim and I am also mindful of the powers vested in me in the conduct of the adjudication proceeding pursuant to section 25 of the CIPAA.

[33] I can appreciate the apprehension of learned counsel for the respondent that the adjudicator might have erroneously proceeded on the wrong principle and paradigm, against the backdrop of the *View Esteem* HC case.

[34] Learned counsel for the respondent humbly submitted that the adjudicator had failed to consider all the defences and/or issues raised by the

respondent in the adjudication response and that the adjudicator has acted in breach of natural justice and therefore, his decision had to be set aside.

[35] With respect that would be too hasty a conclusion. I am very convinced and convicted that the adjudicator in considering whether the claimant had proved its payment claim had nevertheless carefully considered the defences raised with respect to the defects in the de-bonding of the swimming pool and the defects in the expansion joint.

[36] I venture to say that the adjudicator had to so consider the defences raised because it would inextricably affect his consideration of whether the claimant had proved its payment claim. The claimant had asked for the balance retention sum to be released amounting to RM3,120,000.

[37] It is not disputed that the respondent had also released the retention sum to the claimant in the sum of RM3,120,000 (even as recent as 19 February 2016) signifying that the defects have all been rectified, as follows:

Amount of retention sum released:

Date	Amount
19 February 2016	*RM 2,500,000*
22 August 2013	RM 620,000

[38] Conversely if the claimant had not made good all the defects, shrinkages and/or faults appearing within the defect liability period which are specified in the architect's schedule of defects by referencing to its letter to the architect dated 3 October 2014, the respondent would not have released the balance retention sum.

[39] The adjudicator could only decide if the claimant had proved its payment claim by determining if the defects had been rectified. The adjudicator expressly said that he took note of the matters raised in the respondent's adjudication response and teased out in para K16 of his decision in dealing with this as follows:

> 16. *I have taken note that in its Adjudication Response, the respondent has made admissions including the following*:
>
> (a) the claimant has duly and properly performed the works in accordance with the contract;
>
> (b) the Defect Liability Period has expired on 28 March 2014;
>
> (c) the claimant has also given to the respondent's Architect all documents in accordance with Clause 30.6(i) of the contract. The measurement and valuation of the works have also been duly completed within the period of

Final Measurement and Valuation which expired on 28 March 2014 (ie 12 months from the date of issuance of the Certificate of Practical Completion). (Emphasis added.)

[40] It was a further finding of fact at p 19 of his decision as follows:

From the contemporaneous documents submitted, the Final Schedule of Defects was sent by the architect to the claimant vide the architect's letter dated 25 March 2014. Thereafter vide the claimant's letter dated 3 October 2014 the claimant confirmed that they have duly made good all defects, shrinkages and/or faults appearing within the Defect Liability Period which are specified in the architect's Final Schedule of Defects. Thereafter, as at 19 February 2016, the respondent released the retention sum of RM3,120,000.00 to the claimant.

[41] The adjudicator tackled head on the issue or defence of the defects in the de-bonding of the tiles in the swimming pool. There is no way to explain away his treatment of this defence raised for the first time by the respondent in its adjudication response for he set out his reasons in pp 19–24 of his decision as follows:

K1 Issue of debonding of the Tiles in the Swimming Pool

17. The claimant contends that the debonding of the Tiles in the swimming pool which has recurred even after the Defect Liability Period is no longer its responsibility since the expiry of the Defect Liability Period. Notwithstanding the above, the claimant has on a goodwill basis offered to repair the same based on a permanent solution which requires the permission of the respondent and/or Scott Garden to access the swimming pool and to de-water the swimming pool to effect the permanent solution. The cooperation of the respondent and Scott Garden is required as the possession and control of the swimming pool has been delivered to the respondent upon completion of the project.

...

Notwithstanding the claimant's efforts on a goodwill basis, the respondent and/or Scott Garden have refused to cooperate with the claimant and refused to allow access to the swimming pool and this prevented the claimant from effecting the permanent solution.

...

As can be seen from the letters the claimant is willing to rectify the swimming pool tiles on goodwill basis upon the same being de-watered, the architect considers it a *'simple issue'* and the continuing delay in issuance of the CMGD is unfair to the claimant and the respondent is reminded that they have the right to carry out the repairs themselves and charge the claimant for it '*in order that the Long-delayed CMGD can be issued*'.

In fact the claimant has already delivered the tiled necessary for the rectification and the Quotation to effect the rectification works is RM8,750.00.

[42] In the light of the above which clearly showed that the adjudicator did carefully consider and analyse the evidence before him, there is no room to disturb his finding as follows at p 24 of his decision:

> Further Clause 15.2 of the contract provides for the contract Sum to be adjusted accordingly if the defects notified by the architect are not made good entirely at the contractor's own cost. In this case, *I take note that the claimant has agreed to rectify the swimming pool albeit, on a goodwill basis and in the circumstances, the issue of the CMGD can be resolved by deducting from any outstanding sum due to the claimant, the sum of RM8,750.00.* (Emphasis added.)

[43] It was precisely because the adjudicator had considered the defence of defects not rectified with respect to the de-bonding of the tiles in the swimming pool and the willingness of the claimant to rectify it on a goodwill basis that he had allowed a sum of RM8,750. There is no place whatsoever for the respondent to venture to assail this decision of the adjudicator on ground of breach of natural justice.

[44] The respondent had also raised the issue of defects in the expansion joint. Though raised only in the adjudication response, I am sure and satisfied that the adjudicator had considered this defence and indeed did allow the sum of RM101,200 to be deducted from the claimant's claim being the costs to rectify this defect from the evidence adduced.

[45] It was a finding of fact of the adjudicator that the claimant, out of goodwill, had attempted to rectify the leakage at the Expansion Joint but that the respondent had not reverted to the claimant and the proposed rectification was never approved by the respondent and therefore not carried out as shown in the claimant's letters in para K2 18.2 of his decision.

[46] The adjudicator had relied on the quotation that the claimant obtained from one Matlamat Anggun Sdn Bhd for RM101,200. As the respondent did not revert, the claimant could not wait forever though patience is always a virtue but certainly the claimant had not done the works for charity but for business with over RM10m unpaid representing the balance contract sum. One thing is for sure, the respondent cannot stubbornly refuse the CMGD to be issued by the architect on account of these two defects that the respondent had identified and at the same time, putting obstacle in the path of the claimant to make these repairs.

[47] It was after considering fully this perennial complaint of the respondent against the respondent's own reprehensible conduct in preventing the claimant from effecting the rectification works that the adjudicator concluded that the CMGD issue can be resolved by deducting from the outstanding sum due to the claimant, the sum of RM101,200.

[48] It was after considering the defence raised by the respondent and after allowing for the two defects that the claimant had agreed to rectify on a goodwill basis, the adjudicator allowed the balance contract sum claimed minusing the sum of RM109,950.

[49] As for the contract sum the adjudicator was left in no doubt that he could accept the contract sum as determined by the quantity surveyor on 26 October 2016 when he issued the statement of final account for the project specifying the final contract sum of RM239,957,746.12. The claimant has signed the statement and returned it to the respondent, quantity surveyor and architect on 1 November 2016.

[50] The respondent cannot in its defence said that they had not consented to the statement of final account without descending to the details of which items in the statement they had not agreed and what was the alternative sum that the respondent was asserting and why. Such a dispute on the statement without stating the reason therefore smacks of a lack of bona fide and the adjudicator saw through it.

[51] In the circumstances the adjudicator invoked his powers under s 25(m) and (n) of the CIPAA to review the issuance of CMGD and to deem it as have been issued by the architect subject to the adjustment of the final contract sum of RM239,956,746.12 by deducting therefrom the sum of RM109,950. Section 25(m) and (n) of the CIPAA provide as follows:

> The adjudicator shall have the powers to —
>
> (m) review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute;
>
> (n) decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter;

[52] The final calculation of the outstanding sum is derived as follows:

Final contract sum based on Final Statement of Account	RM239,956,746.12
Less Total Payment to Date Certified Amount Paid	(RM 226,613,427.16)
Part of Retention Sum Released on 19 February 2016 and 22 February 2016	(RM 3,120,000)

Less	
Rectification costs for the De-bonding of the Swimming Pool's riles	(RM 8,750)
Rectification costs for the expansion joint.	(RM101,200)
TOTAL	RM10,113,368.96

[53] There is thus no breach of natural justice that had been made out and correspondingly the adjudicator had decided the issues submitted for him to decide even though the defences of the respondent were raised for the first time in the adjudication response and he had certainly kept to the jurisdiction conferred on him by the parties.

Whether the adjudicator had failed to consider the respondent's cross-claim for damages for loss of reputation and thus in breach of natural justice

[54] The respondent was understandably apprehensive that the adjudicator in his adjudication decision had taken an unduly restrictive view of his jurisdiction as expressed in para 22.1 at p 28 of the adjudication decision as follows:

> It is repeated that the respondent did not submit any Payment Response and the cross-claim was raised for the first time in its Adjudication Response. The adjudicator accordingly has no jurisdiction to determine the respondent's cross-claim as the adjudicator's jurisdiction pursuant to section 27(1) CIPAA, in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to section 5 (Payment Claim) and 6 (Payment Response).

[55] Learned counsel for the respondent then continued to say rather cryptically in his submission before this court as follows: 'The adjudicator had then dismissed the cross-claim'.

[56] To be fair to the adjudicator, he did not come to that conclusion by a mere dismissing of the cross-claim on the pure ground of a lack of jurisdiction premised on s 27(1) of the CIPAA. He continued by stating clearly that apart from the primary jurisdictional issue which was the position of the law then pre-*View Esteem* FC case, the adjudicator nevertheless proceeded to continue whether the claim for damages for loss of reputation is recoverable in an action founded on breach of contract.

[57] At that stage the adjudicator already had made a finding of fact that the claimant was prepared to attend to the defects though these were defects that appeared after the expiry of the defect liability period and he had assessed the cost of rectifying the defects to be RM109,950. That is also in spite of the

claimant taking the stand that with respect to the leakage at expansion joint it was a problem due to the inadequacy of the respondent's design and/or specification and not attributable to the claimant's material or workmanship.

[58] The architect had issued the CPC and it is anybody's guess how long a contractor must be around to attend to defects after the defect liability period unless it is a claim for negligence in the workmanship of the contractor. The claimant as the contractor was gracious to accept a deduction from its claim for these so-called defects so as to get round the respondent's excuse for not paying the balance contract sum.

[59] The adjudicator gave his additional reason for dismissing the respondent's claim for damages loss of reputation. He stated the position of the law as he understood it in the issue raised which is clearly stated in para H 10.4 of the adjudication decision as:

> What is the status of the respondent's cross-claim for damages for defects, shrinkages and/or faults including general damages for the loss of reputation and image.

[60] The adjudicator had allowed the respondent's cross-claim of costs to rectify the two defects in the de-bonding of the tiles in the swimming pool and the leaks in the expansion joint by allowing a deduction of RM109,950 from the balance contract sum claimed of RM10,223,318.96.

[61] The adjudicator had given his additional reason for dismissing the respondent's claim for loss of reputation in that such a claim is unsustainable in an action founded on breach of contract. He supported it with reference to a substantial body of case law in *Milicent Rosalind Danker & Percetion Management International Limited v Malaysia-Europe Forum Berhad, Natasha Zulkifli & Anor* [2011] MLJU 452; [2012] 2 CLJ 1076; *Kapt (B) Haji Mohamad bin Ismail v Perwira Affin Bank Bhd* [2001] 5 MLJ 101; [2001] 5 CLJ 184 and *Addis v Gramophone Co Ltd* [1909] AC 488.

[62] In *Milicent Rosalind Danker*'s case it was observed as follows:

> [50] It is also trite law that damages for loss of reputation are not recoverable in an action founded on breach of contract except in three well-known cases, namely, actions against a banker for refusing to pay a customer's cheque when he has in his hands funds to meet it, actions for breach of promise to marry, and actions where the vendor of real estate, without any fault on his part, fails to make title (*Addis Gramophone Co Ltd* [1909] AC 488 and followed in *Kapt (B) Hj Mohamad Ismail v Perwira Affin Bank Bhd (No 2)* [2001] 5 MLJ 101; [2001] 5 CLJ 184). It was suggested in *CCA Holdings Ltd v Palm Resort Bhd* [1998] 4 MLJ 143; [1998] 4 CLJ 440 that there may be other exceptions.

> [51] Whatever may be the position, any such claim will have to pass the remoteness rule in s 74 of the Contracts Act 1950 which I had referred to earlier. I do not think it can be said with any firm degree of conviction that the parties contemplated loss of reputation as arising from the breach of the contract. That sort of damage is far too remote. I would therefore surmise that damages for loss of reputation generally cannot be claimed except in actions for defamation. If the plaintiffs were really serious about claiming damages for loss of reputation and for injured feelings, they ought to have filed a claim for defamation instead of proceeding in the fashion that they did. No damages are therefore allowable in this regard.

[63] This is not a claim for defamation anyway. At any rate, there is no evidence before the adjudicator with respect to any loss of reputation. If at all, whatever reputation that the respondent is zealous of guarding has been seriously dented by its own conduct in withholding the payment of some RM10m for the balance contract sum considering that the CPC has been issued on 29 March 2013 and the defect liability period has expired on 28 March 2014.

[64] It is apposite to apply the legal proposition in *Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC) that '22.1 ... If the adjudicator has endeavored generally to address those issues in order to answer the questions then, whether right or wrong, his decision is enforceable: see *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358'.

[65] Even assuming for a moment that there was a breach of natural justice, the breach must be material as was held in *Pilon*'s case as follows:

> 22.4. It goes without saying that any such failure must also be material: see *Cantillon v Urvasco* and *CJP Builders Limited v William Verry Limited* [2008] EWHC 2025 (TCC). In other words, the error must be shown to have had a potentially significant effect on the overall result of the adjudication: see *Keir Regional Ltd v City and General (Holborn) Ltd* [2006] EWHC 848 (TCC).

[66] There is also no good ground for alleging that the adjudicator had exceeded his jurisdiction in arriving at his adjudication decision.

[67] Having regard to the overall justice of the case where the respondent was unreasonably refusing to pay the balance of the contract sum of over RM10m when the costs of rectifying to defects had been assessed to be about RM109,950, the adjudicator's decision of temporary finality only, should not be disturbed or interfered with.

[68] There was also a prayer by the respondent for a stay of execution in encl 1 for the application to set aside the adjudication decision. Upon a closer examination, it is actually a prayer for a stay of the adjudication decision

pending the hearing of the application to set aside the adjudication decision as is obvious from the Bahasa Malaysia version filed of which the English version is only a translation that is not mandatory and there is no reference to whether the stay is until the disposal of the hearing to set aside the adjudication decision.

[69] I agree with learned counsel for the claimant that the Bahasa Malaysia version of encl 1 should prevail in view of O 92 r 1(a) of the Rules of Court 2012.

[70] That stay application of the adjudication decision had become academic as the court had heard the two originating summonses together. Therefore the prayer for stay was struck out.

PRONOUNCEMENT

[71] Therefore for the reasons given above, I had dismissed the setting aside application and correspondingly and consequently granted the enforcement application.

[72] After hearing the parties on costs, I had allowed costs of RM10,000 for the setting aside application to be paid by the respondent, Aston Villa, to the claimant, Infra Segi, and as for the enforcement application, I had allowed costs of RM5,000 to be paid by the respondent to the claimant.

Setting aside application dismissed and enforcement application granted with costs of RM10,000 and RM5,000 respectively to be paid to claimant.

Reported by Nabilah Syahida Abdullah Salleh